Filed 6/7/10 Otay Acquisitions v. City of San Diego CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OTAY ACQUISITIONS LP, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent.	E046939 (Super.Ct.No. 753247) OPINION

APPEAL from the Superior Court of San Diego County. Linda B. Quinn, Judge. Affirmed in part; reversed in part with directions.

Niddrie, Fish & Buchanan, Michael H. Fish; Thorsnes, Bartolotta & McGuire, Vincent J. Bartolotta, Jr.; Wasserman, Comden & Casselman, David B. Casselman; Ward & Ward and Alexandra S. Ward for Plaintiff and Appellant.

Office of the City Attorney, Andrew Jones; Latham & Watkins, Kristine L. Wilkes, Katherine Mayer, Michael Pulos and Patricia Guerrero for Defendant and Respondent.

In this case and two companion cases—*National Enterprises, Inc. v. City of San Diego*, E046937, and *Border Business Park, Inc. v. City of San Diego*, E046940—the plaintiffs sued the City of San Diego (hereafter the City) for breach of a development agreement pertaining to property in Border Business Park in Otay Mesa and for inverse condemnation. In all three cases, we address the plaintiffs' contentions that the trial court incorrectly sustained the City's demurrers without leave to amend. In this case, we reverse as to the cause of action for breach of contract, but affirm the judgment as to the cause of action for inverse condemnation.[1]

BACKGROUND

In reviewing a judgment based on an order sustaining a demurrer, we take the underlying facts from the complaint and from documents subject to judicial notice. (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734, fn. 2.) Here, we take the underlying facts from the operative third amended complaint (hereafter referred to as the complaint), and from documents of which the trial court took judicial notice. This case is factually related to our earlier decision in *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538 (Fourth Dist., Div. Two) (*Border v. San Diego*), and we have also drawn some of the underlying facts from that decision.

In 1986, the City entered into a development agreement with a real estate developer, Border Business Park, Inc. (hereafter Border). The agreement applied to a

[1] Although all three cases present similar issues, there are significant differences among the three which render it impractical to consolidate them. For that reason, we deny the plaintiffs' joint motion for consolidation.

312-acre tract of land in Otay Mesa which Border sought to develop into a business park. The contract provided, among other things, that for the duration of the 21-year term of the agreement, the City would not apply, either to Border or to any subsequent purchaser of property within the business park, any later-enacted laws which would restrict or prevent development within the park. (The underlying history of this agreement is set forth in more detail in our opinion in *Border v. San Diego, supra,* 142 Cal.App.4th at pp. 1544-1546.)

Allegedly as a result of breaches of the agreement by the City and of actions by the City amounting to inverse condemnation which impaired Border's ability to sell or lease properties within the business park, Border lost a number of parcels in foreclosure and incurred other damages. Border sued the City for breach of contract and for inverse condemnation based on the City's conduct with regard to its plans to relocate San Diego's international airport to Otay Mesa and on its rerouting of truck traffic in a way which interfered with the easement of access to the business park; the City cross-complained for unfair business practices and breach of contract.[2] The trial court ruled that the City's actions concerning the airport development plan and the rerouting of truck traffic constituted inverse condemnation. The issue of damages for inverse condemnation was submitted to a jury, as were Border's claim for breach of contract and the City's

[2] Border also asserted at trial that the rerouting of truck traffic resulted in a degree of noise, dust and fumes generated by idling trucks which was "'not far removed from a direct physical intrusion'" or which constituted a nuisance. That theory was not submitted to the jury, however. (*Border v. San Diego, supra,* 142 Cal.App.4th at pp. 1559-1560.)

claims.[3] The jury returned a verdict against the City on its cross-complaint and in favor of Border on all of its claims. It awarded Border approximately $29 million for breach of contract and $65 million for inverse condemnation. The City appealed the judgment in favor of Border, and Border appealed the order granting the City a new trial on Border's breach of contract claim. The City did not appeal the judgment in favor of Border on the cross-complaint. (*Border v. San Diego, supra,* 142 Cal.App.4th at pp. 1543-1544, 1546.)

We reversed the judgment for inverse condemnation, holding that the evidence was insufficient as a matter of law both as to the airport inverse condemnation cause of action and as to the easement of access cause of action. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at pp. 1546-1551, 1551-1560.) We affirmed the trial court's order for a new trial on Border's breach of contract claim and remanded the cause to the trial court for further proceedings. (*Id*. at pp. 1560-1567.)

In 1997, after Border had lost a number of its properties as described above and while its lawsuit in *Border v. San Diego* was pending, Otay Acquisitions LLC acquired several parcels of property within the business park at a public foreclosure sale. Otay Acquisitions LP also acquired several parcels within the business park between August 1997 and January 1999. Otay Acquisitions LLC and Otay Acquisitions LP are special purpose entities created by National Enterprises, Inc. for the purpose of obtaining

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[3] In a claim for inverse condemnation, the court determines whether the public entity's actions constitute inverse condemnation and the jury determines damages. (*Border v. San Diego*, *supra*, 142 Cal.App.4th at p. 1546, fn. 6.)

financing to develop the properties.[4] According to the complaint, Otay Acquisitions LP is the successor in interest to Otay Acquisitions LLC, apparently with respect to all of the properties originally acquired by Otay Acquisitions LLC.

As purchasers of property within the business park, Otay Acquisitions LLC and Otay Acquisitions LP were entitled under the terms of the development agreement and by statute to the benefit of the agreement. (Gov. Code, § 65868.5.)[5]

On November 17, 1999, Otay Acquisitions LLC presented a claim to the City pursuant to the Government Claims Act (§ 900 et seq.),[6] alleging a number of breaches of the development agreement. The City informed Otay Acquisitions LLC that its claim was not in compliance with the Government Claims Act, and on January 4, 2000, Otay

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[4] A special purpose entity is a recognized form of business entity which is unlikely to become insolvent as a result of its own activities and which is adequately insulated from the consequences of any related party's insolvency. They are separate legal entities "distinct from any other person or entity," which are created solely for the purpose of obtaining loans which are being made as part of portfolios for commercial mortgage-backed securities. They are typically corporations, limited partnerships and limited liability companies. (See <http://en.wikipedia.org/wiki/Special_purpose_vehicle> [as of May 17, 2010].)

[5] Government Code section 65868.5 provides, in part, that "the burdens of [a development agreement] shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement."

All further statutory citations refer to the Government Code unless another code is specified.

[6] The informal short title of this act is the "Tort Claims Act." However, because the act applies to claims for breach of contract as well as to tort claims, the California Supreme Court has elected to refer to it as the "Government Claims Act." (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 734.) We do likewise.

Acquisitions LLC submitted an amended claim. On February 25, 2000, the City informed Otay Acquisitions LLC that its claim was deemed denied by operation of law.[7]

Otay Acquisitions LLC filed its original complaint in August 2000, alleging breach of contract and inverse condemnation. On June 15, 2001, the trial court stayed this case, along with *National Enterprises, Inc. v. City of San Diego* (Super. Ct. San Diego County, No. 730011), pending resolution of posttrial motions and entry of judgment in *Border v. City of San Diego* (Super. Ct. San Diego County, No. 692794).[8]

After the stay was lifted, the third amended complaint was filed.[9] On June 6, 2007, the City demurred. It contended that the complaint failed to state a cause of action for breach of contract because it failed to allege compliance or excuse from compliance with the Government Claims Act. It also contended that the complaint failed to state a

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[7] The complaint does not allege that Otay Acquisitions LLC or Otay Acquisitions LP submitted claims pursuant to the Government Claims Act. Rather, it alleges that the development agreement waives compliance with the Government Claims Act. However, the trial court took judicial notice of the claims submitted by Otay Acquisitions LLC and of the City's responses, which were submitted by the City in support of its demurrer. As we discuss below, the complaint can be amended to allege compliance with the Government Claims Act based on the claims submitted by Otay Acquisitions LLC.

[8] The stay order is not part of the record on appeal in this case. It is included in the record on appeal in *National Enterprises, Inc. v. City of San Diego*, E046937. We take judicial notice of the order. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

[9] Although the caption continues to show only Otay Acquisitions LLC as the plaintiff, the body of the complaint states that Otay Acquisitions LP, as successor in interest to Otay Acquisitions LLC, is the sole plaintiff. Hereafter, "plaintiff" refers to Otay Acquisitions LP.

cause of action for inverse condemnation because that claim was barred as a matter of law by the res judicata effect of our opinion in *Border v. San Diego*.

The court sustained the demurrer without leave to amend on November 16, 2007. The trial court granted the City's motion for attorney fees on April 4, 2008, and judgment was entered on April 10, 2008.

Plaintiff filed a premature notice of appeal, which was accepted by Division One of this court on May 21, 2008. Thereafter, the cause was transferred to this court.[10]

LEGAL ANALYSIS

STANDARD OF REVIEW

In an appeal from a judgment based on an order sustaining a demurrer for failure to state a cause of action, the reviewing court treats the demurrer as admitting all material facts properly pleaded and, giving the complaint a reasonable interpretation, independently determines whether the complaint states a cause of action under any legal theory. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) Because a demurrer raises only questions of law, "'an appellant challenging the sustaining of a general demurrer may change his or her theory on appeal [citation], and an appellate court can affirm or reverse the ruling on new grounds. [Citations.] After all, we review the validity of the ruling and not the reasons given. [Citation.]'" (*Alfaro v.*

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[10] On June 6, 2008, the trial court denied plaintiff's motion for new trial. Although plaintiff asks that we reverse the order denying its motion for new trial, it does not raise any issues pertaining to the denial of the motion. Consequently, we disregard the request.

Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal.App.4th 1356, 1396-1397.) We review the decision to sustain the demurrer without leave to amend for abuse of discretion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) If there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, at p. 39.) Leave to amend may be granted on appeal, even if it is not requested by the plaintiff. (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 746; Code Civ. Proc., § 472c, subd. (a).)

LEAVE TO AMEND MUST BE GRANTED AS TO THE BREACH OF CONTRACT CAUSE OF ACTION

Introduction

The Government Claims Act (hereafter sometimes referred to as "the Act") provides a mandatory procedure for the presentation of "all claims for money or damages against local public entities," subject to some exceptions.[11] (§§ 905, 910 et seq.) This includes claims for breach of contract. (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at pp. 737-738.) Presentation of a claim which complies with the Act is a prerequisite to the filing of a lawsuit seeking money or damages from a public entity. (§ 945.4.) Furthermore, compliance with the Act's claim presentation procedure is an element of a cause of action for damages against a public entity. Consequently, failure to

[11] One exception is claims for inverse condemnation. (§ 905.1.) Consequently, we will discuss the order sustaining the demurrer as to the inverse condemnation cause of action separately.

allege facts demonstrating or excusing compliance with the claim presentation requirement subjects a complaint to a general demurrer. (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237, 1239-1245.)

The trial court sustained the demurrer as to the breach of contract claim because plaintiff did not present a Government Code claim of its own but instead relied on the Government Code claims of the "original" plaintiff, i.e., Otay Acquisitions LLC; because the allegations of the complaint "vary fundamentally" from the allegations of the claim presented by Otay Acquisitions LLC; and because Otay Acquisitions LLC's claim was defective in any event because it failed to allege the date of the breach as required by section 910. Plaintiff contends that each of these rulings was erroneous.

Plaintiff Has Failed to Show That the Development Agreement Can Be Understood to Waive Compliance With the Government Claims Act

In its opposition to the demurrer, plaintiff argued that the development agreement waived compliance with the Government Code's claim presentation requirements. The trial court ruled that plaintiff was precluded by the decision in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, from arguing that the development agreement waived compliance with the Government Claims Act. It also held that the development agreement does *not* excuse compliance with the Act. Plaintiff now contends that res judicata does not preclude it from arguing that the development agreement waives compliance with the Government Claims Act. Even if we assume that this is correct, however, reversal of the judgment is not warranted because plaintiff makes no argument

that the trial court incorrectly found that the development agreement does not waive compliance with the Act. Rather, plaintiff argues that the trial court was required to accept as true the allegation in the complaint that the parties intended to waive compliance with the Act. This premise is incorrect.

The complaint alleges that in entering into the development agreement, the parties to the agreement (i.e., Border and the City) "negotiated for and agreed that no failure or delay by any party in asserting its rights under the Agreement would constitute a waiver of the right to sue. By negotiating this and other provisions, the parties intended to abrogate the application of all statutes of limitation and Government Code requirements. . . . [¶] The parties further negotiated for and agreed that any party could seek judicial relief without the necessity of obtaining final administrative rulings, filing claims pursuant to California Government Code sections 900, et seq., or satisfying any other contractual, statutory or other pre-filing requirements." The complaint quotes two paragraphs of the agreement, and the agreement itself is attached to the complaint as an exhibit.

Neither of the provisions the complaint quotes explicitly state that it is the parties' intention to waive compliance with the Government Claims Act. Nevertheless, plaintiff argues that the allegation that the parties intended to waive compliance precluded the court from sustaining the demurrer. Plaintiff cites *Aragon-Haas v. Family Security Ins. Services, Inc*. (1991) 231 Cal.App.3d 232, which holds, in part, that where a complaint is based on a written contract which is set out in full in the complaint or attached to the

complaint, "a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning [of] which the instrument is reasonably susceptible." (*Id*. at p. 239.) Whether a contract is ambiguous is a question of law for the court, however. (*Ibid*.) So, too, is the question whether contract language is reasonably susceptible of the meaning urged by the party: "'When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" [of] the interpretation urged by the party. If it is not, the case is over.' [Citation.]" (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 393.) If the court determines that the language *is* reasonably susceptible of the meaning the party ascribes to it, extrinsic evidence is admissible to prove that the parties intended that meaning. (*Id*. at p. 391.)

Here, the trial court found that the language of the agreement was *not* reasonably susceptible of the meaning plaintiff ascribes to it: It found that the agreement contains no provision which excuses compliance with the Government Claims Act. Plaintiff offers no argument as to why the court's conclusion is incorrect, nor does it explain how the provisions of the agreement which are quoted in the complaint are susceptible of the interpretation it asserts.

Even though the meaning of the contractual language is a legal issue which we review independently, it is not our function to undertake the analysis in the absence of any argument by the appellant. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) In the absence of any meaningful argument by plaintiff, it suffices to say that we see

nothing in the provisions of the agreement on which plaintiff relies which reasonably supports the conclusion that it was intended to waive compliance with the Government Claims Act.

The Complaint May Be Amended to Allege Compliance With the Government Claims Act

The trial court also sustained the demurrer because plaintiff did not allege that it presented a Government Code claim. It held that because the complaint varies fundamentally from the Government Code claim presented by the original plaintiff, Otay Acquisitions LLC, plaintiff cannot rely on its predecessor's claim. Plaintiff acknowledges that the complaint does not allege that it complied with the Government Claims Act. It contends, however, that it can amend the complaint to allege compliance because it was entitled to rely on its predecessor's Government Code claim. It also contends that the complaint does not vary materially from the claim presented by Otay Acquisitions LLC. We agree in part.

As a prerequisite for suing a public entity for damages, the Government Claims Act requires presentation of a claim. (§ 945.4.) The claim must state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and must provide a "general description of the . . . damage . . . so far as it may be known at the time of presentation." (§ 910, subds. (c) & (d).) The purpose of the claim presentation requirement is "'to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the

expense of litigation.' [Citation.]" (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446.) An additional purpose is to allow the public entity to take the potential claim into account in its fiscal planning. (*San Diego Unified Port Dist. v. Superior Court* (1988) 197 Cal.App.3d 843, 847 (*San Diego Unified Port Dist.*).)

To effectuate these purposes, each individual who has suffered injury from a single occurrence or transaction is normally required to present a separate claim. This is because each individual's claim for damages will be different, and the extent of potential damages will be unknown to the public entity in the absence of a claim for each individual. (*San Diego Unified Port Dist., supra*, 197 Cal.App.3d at pp. 850-851.) And, under some circumstances, the potential liability may be of a different kind. (See *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1992) 8 Cal.App.4th 729, 733-734, and cases discussed therein.)

If, however, the second person "stands in the stead" of the original claimant and that person's right of action is not independent but is rather identical to and wholly derivative of the original claim, the requirements of the claim statutes have been satisfied by the original claim. (*Smith v. Parks Manor* (1987) 197 Cal.App.3d 872, 881.) For example, because a subrogee's claim is identical to and entirely derivative of the claim of the injured person, the subrogee need not present a separate Government Code claim but may rely on the injured person's claim. (*Ibid.*; accord, *San Diego Unified Port Dist., supra*, 197 Cal.App.3d at pp. 846-848.) Likewise, an assignee of a claim steps into the

shoes of the assignor, "'taking [its] rights and remedies, subject to any defenses which the obligor has against the assignor prior to notice of the assignment.' [Citation.]" (*Johnson v. County of Fresno* (2003) 111 Cal.App.4th 1087, 1096, italics omitted.) Similarly, to the extent that a successor in interest in real property is pursuing claims of his or her predecessor with respect to the property, the successor's claim is not independent but is merely derivative of the predecessor's claim. (See Code Civ. Proc., § 368.5.)[12]

Here, the complaint alleges that Otay Acquisitions LP is the successor in interest to Otay Acquisitions LLC. Accordingly, plaintiff is entitled to rely on Otay Acquisitions LLC's Government Code claim and may sue for any breach of the development agreement which is "fairly reflected" in the claim.[13] (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority*, *supra*, 34 Cal.4th at p. 447.) The complaint may not, however, "'premise civil liability on acts or omissions *committed at different times . . . than those described in the claim*' . . . . [Citation.]" (*Ibid*., italics added.) Any

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[12] Code of Civil Procedure section 368.5 provides, "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Accordingly, a property owner may continue to prosecute a claim pertaining to real property first brought by his or her predecessor in interest, either under his or her own name or under the name of the predecessor (*Zimberoff v. Bank of America Nat. Trust & Savings* (1952) 112 Cal.App.2d 555, 557 [citing former Code Civ. Proc., § 385]), as may an assignee of a claim. (See *California Coastal Commission v. Allen* (2008) 167 Cal.App.4th 322, 324.)

[13] Although it is not alleged in the complaint, Otay Acquisitions LLC apparently assigned its claims to plaintiff.

alleged breach of the contract which postdates the claim or which is not fairly reflected in the claim for any other reason is barred.

The complaint alleges a number of breaches of the agreement which took place in 2002 and 2003. Plaintiff contends that a new Government Code claim is not required for "post-claim breaches of the same contract." The cases it cites—*Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, and *Amador Valley Investors v. City of Livermore* (1974) 43 Cal.App.3d 483—do not support that contention.

Amador Valley Investors v. City of Livermore, *supra*, 43 Cal.App.3d 483 (*Amador Valley*), does not involve a breach of contract; it is a tort case. In that case, the plaintiffs sued the city for repeatedly discharging treated sewage water onto property they planned to develop. (*Id.* at p. 488.) On appeal, the city contended that the action was time-barred because the Government Code claim was submitted more than one year after the first incident. The court held that a cause of action "emanated from each discharge" because each incident not only enhanced damage already done but added new damage. The court concluded that the plaintiffs could submit their claim after the discharges ceased, and could recover for damages incurred within one year prior to the date the claim was submitted. (*Id.* at pp. 489-490.) (The opinion is unfortunately vague as to the details, but it appears that the discharge of treated sewage water began in May 1967 and continued through June 11, 1968. The Government Code claim was apparently submitted on June 28, 1968, in that the court held that the plaintiffs could recover for damages incurred on or after June 28, 1967. (*Id.* at p. 490.)) The court did not, however, hold that the

plaintiffs could base their complaint on any sewage water discharges which occurred after the claim was submitted. Thus, the case not only does not involve "post-claim breaches of the same contract," it does not even provide an analogy on which plaintiff could base its argument.

Ocean Services Corp. v. Ventura Port District, *supra*, 15 Cal.App.4th 1762 (*Ocean Services*) does involve a claim for breach of contract. It does not, however, hold that "post-claim breaches of the same contract" do not require a new Government Code claim. Rather, in the pertinent portion of the opinion, it holds that "[a] new statutory claim was not required for each *damage* flowing from the contractual breach" and "a plaintiff who suffers continuing damages [from the same breach of a contract] may be awarded damages accruing after submission of the claim." (*Id.* at p. 1777, italics added; p. 1778.) It cites *Amador Valley*, *supra*, 43 Cal.App.3d 483 as authority. (*Ocean Services*, *supra*, at p. 1778.) Its holding is actually based, however, on *Bellman v. County of Contra Costa* (1960) 54 Cal.2d 363 (*Bellman*), a case which is discussed in *Amador Valley* (*Amador Valley*, at pp. 489-490) but on which *Amador Valley* does not actually rely for its holding.

In *Bellman*, *supra*, 54 Cal.2d 363, the plaintiff sustained damages resulting from land slippage resulting from excavation on adjoining land, beginning in 1952. The plaintiff discovered the damage in March 1954 and submitted a claim in February 1957. Further slippage continued to the time of trial in April 1958. (*Id*. at p. 365.) The government claims statute then in effect required presentation of a claim within a year

"'after the last item [of damage] accrued.'" (*Id*. at p. 369, citing Gov. Code, former § 29702.) The California Supreme Court held that this was not a single, continuous tort; rather, a new cause of action arose with each instance of ground subsidence and the statute of limitations ran separately for each instance. It held, however, that the "items of damage for which recovery may be had once a claim has been filed" are "those items of damage which accrued within . . . one year . . . prior to the date of filing of the required claim and also, *without the necessity of filing successive claims, on such items as accrue after that date.*" (*Bellman*, at p. 369, italics added.) "Such items as accrue" after the date of the claim refers only to items of damage from the same tortious act or breach of contract; it does not refer to post-claim acts or omissions which constitute independent torts or breaches of the contract.

While neither *Amador Valley* nor *Ocean Services* holds that no new claim need be presented for new breaches of a contract, as plaintiff contends, prospective damages may be recovered without the necessity of filing a new claim for each instance of an ongoing injury.[14] (*Bellman, supra*, 54 Cal.2d at p. 369; *Ocean Services*, *supra*, 15 Cal.App.4th at

[14] Plaintiffs contend that *Ocean Services* does hold that post-claim breaches of a contract do not require a new Government Code claim. We disagree. In *Ocean Services*, the court held that the public entity had waived the claims presentations requirements of the claims act and was estopped to assert that a second claim, or an amended claim, was untimely. (*Ocean Services*, *supra*, 15 Cal.App.4th at pp. 1776-1777.) Any post-claim breaches, as far as we understand the case, were incorporated in the amended claim. If our reading of the case is erroneous, then *Ocean Services* is contrary to *Bellman*. We, of course, are bound by *Bellman.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

p. 1778.) Accordingly, plaintiff may seek to recover any post-claim damages resulting from the breaches alleged in the Government Code claim.

Because plaintiff is entitled to pursue the claims asserted by Otay Acquisitions LLC in its Government Code claim without having submitted a claim of its own, it was an abuse of discretion to deny it leave to amend the complaint to allege those (and only those) breaches of the agreement. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

Otay Acquisitions LLC's Government Code Claim Substantially Complied with Section 910

Plaintiff also contends that the trial court incorrectly found the claim was defective because it failed to allege the date of damage as required by section 910. The court held that the substantial compliance doctrine does not apply to this defect.

Section 910 requires that the claim state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and provide "[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." Because the purpose of the claim is to give the government entity notice sufficient for it to investigate and evaluate the claim, not to eliminate meritorious actions, strict compliance with section 910 is not required. Rather, the statutes should be given a liberal construction to permit full adjudication on the merits, and as long as the policies of the claims statutes are effectuated, substantial compliance is all that is required. (*Stockett v. Association of Cal. Water Agencies Joint*

Powers Ins. Authority, supra, 34 Cal.4th at pp. 446, 449; *State of California v. Superior Court (Bodde), supra*, 32 Cal.4th at p. 1245.)

The Government Code claim presented by Otay Acquisitions LLC alleges that the City obstructed and delayed its "attempts to exercise its right to develop the Property in accordance with the Agreement by [imposing] Housing Trust Fund fees, modifying specifications for improvements, modifying building standards, imposing new conditions on development of the land, and failing to issue a building permit in a timely manner." It also alleges that the City had imposed improper conditions for issuance of a building permit and imposed a housing trust fund fee in the amount of $6,812.95, even though such fees were waived for all projects in Otay Mesa. It alleges that these actions took place between 1997 and the present, i.e., December 14, 1999, the date the claim was signed. The claim then more specifically alleges that Otay Acquisitions LLC applied for the building permit, which it identifies by application number, on June 20, 1998. It alleges that the City delayed issuance of the permit by requiring a conditional use permit, and that after "[m]any months" of negotiations with the Development Services Department, the City conceded that the conditional use permit was not required. This sufficiently identifies the time of the occurrence to enable the City to examine its own records pertaining to the building permit application. The claim also appears to allege that the City imposed the housing trust fund fee in the amount of $6,812.95 as a condition of issuance of the building permit. This would be a matter of record which the City could

easily verify, particularly since a time frame—between June 20, 1998 and December 14, 1999—is given.

As to the remaining allegations—that the City modified specifications and building standards and imposed new conditions on development of the land—the problem is not so much that a fairly broad time frame is given, but that the allegations themselves are vague. However, all of the alleged acts pertain to the efforts of plaintiff and its predecessor in interest to develop the land under the terms of the development agreement. We would assume that modifications of specifications and standards and the imposition of new conditions would also be a matter of record within the City's development department and that the City could investigate by examining the records pertaining to the properties subject to the development agreement or by speaking to its employees who were overseeing the development of Border Business Park. The claim identifies seven "public employees" who allegedly "caus[ed] the damages." Whether the City was actually able to investigate these claims sufficiently is, of course, a question of fact which cannot be addressed at the pleading stage. We cannot, however, say as a matter of law that the claim was too vague as to the alleged dates of occurrence to permit the City to investigate. We must therefore conclude that an allegation that the claim substantially complied with section 910 is sufficient to withstand a demurrer and that the trial court abused its discretion by sustaining the demurrer without leave to amend to

allege substantial compliance.[15] (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

The Judgment Cannot Be Affirmed On the Ground That the Claim Is Time-barred

The City contends that the complaint shows on its face that many of the alleged breaches accrued more than one year before the Government Code claim was presented and that the breach of contract cause of action is therefore barred by the statute of limitations.

The City is correct that a claim for breach of contract must be submitted within one year after the accrual of the cause of action. (§ 911.2, subd. (a).) Because the City did not assert that ground in its demurrer, however, we may not affirm the judgment on that basis. The statute of limitations is a "special defense, personal in its nature," which may be waived. The defendant must "affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived." (*Union Sugar Co. v. Hollister Estate Co.* (1935) 3 Cal.2d 740, 744-745.) For that reason, a general demurrer cannot be sustained on the ground that the claim is barred by the statute of limitations unless the demurrer specifically relies on that ground. (*Burke v. Maguire* (1908) 154 Cal. 456, 462 [dictum, discussing origin of rule]; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 962, p. 375.)

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[15] Because we have concluded that the claim substantially complies with the date requirement, we need not address plaintiff's contention that the City waived any defect in the claim.

In any event, plaintiff may exclude any time-barred claims from its amended complaint. If it fails to do so, the City may demur on that basis.

THE INVERSE CONDEMNATION CAUSE OF ACTION IS BARRED BY RES JUDICATA

"'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Here, the trial court sustained the demurrer as to the inverse condemnation cause of action because it concluded that the claim is "barred by res judicata under *Border Business Park*."[16] Plaintiff contends that the ruling was erroneous for the "same reasons" it asserted that res judicata does not bar it from litigating whether the City waived the Government Claims Act in the development agreement, i.e., because neither Otay Acquisitions LLC nor Otay Acquisitions LP was a party to the litigation in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, nor are they in privity with Border.

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16 The ruling states, "The . . . cause of action for inverse condemnation . . . fail[s] to state facts sufficient to constitute a cause of action. [The cause of action is] barred by res judicata under *Border Business Park*." Although it is possible to read the ruling as stating two grounds for sustaining the demurrer—factual insufficiency and res judicata—the City's demurrer asserts only that the cause of action fails as a matter of law because it is barred by res judicata. Accordingly, we infer that the court intended to sustain the demurrer only on that ground. The City does not contend otherwise and makes no argument that the complaint fails to state a cause of action on any ground other than res judicata.

In its demurrer, the City contended that the plaintiffs (referring to Otay Acquisitions LLC and Otay Acquisitions LP) are in privity with Border because in *Border v. San Diego*, Otay Acquisitions LLC was declared an alter ego of Border Business Park, Inc. and of Roque De La Fuente, II, and because the trial court in that matter made Otay Acquisitions LLC a party to the litigation. The City also contended that plaintiff or its predecessor have admitted the preclusive effect of *Border v. San Diego* and that they have admitted a successor-in-interest relationship between themselves and Border, which, the City contends, in itself suffices to establish privity.

We need not address the alter ego rulings made in the trial court in *Border v. San Diego* to determine that plaintiff is bound by the decision in that case.

For purposes of res judicata or collateral estoppel, privity refers "'to a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify application of the doctrine of collateral estoppel. [Citations.]' [Citations.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1069-1070 (*Citizens for Open Access*).) In the final analysis, the determination of privity depends upon the fairness of binding the appellant with the result obtained in earlier proceedings in which it did not participate. (*Id*. at p. 1070.) """Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the . . . party in

the first action. [Citations.] The circumstances must also have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. . . .'" [Citations.]" (*Ibid.*)

A party is adequately represented for purposes of privity if his or her interests "'are so similar to a party's interest that the latter was the former's virtual representative in the earlier action.' [Citations.]" (*Citizens for Open Access, supra,* 60 Cal.App.4th at p. 1070.) To determine the adequacy of representation, we examine "'whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest. If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity. [Citations.]'" (*Id.* at p. 1071.)

Here, plaintiff is a successor in interest to Border with respect to the property it owns in Border Business Park and has a sufficient "identification in interest" with Border "as to represent the same legal rights." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875.) Both suits involve property within Border Business Park, and the complaint in this case alleges inverse condemnation based on the same facts alleged in *Border v. San Diego*, i.e., the City's diversion of truck traffic bound for the Otay Mesa border crossing, resulting, allegedly, in gridlock around the business park, excessive truck traffic within the business park, and noise and diesel fumes which affected the business park and its tenants. (See *Border v. San Diego, supra,* 142 Cal.App.4th at pp.

1551-1552.) It cannot be denied that Border vigorously represented those interests, despite its ultimate defeat on the issue on appeal.

In addition, when plaintiff joined the current lawsuit, it must reasonably have expected to be bound by the decision in *Border v. San Diego.* Otay Acquisitions LP first became a plaintiff in the second amended complaint, which was filed on or about July 25, 2005. In its order staying this case and *National Enterprises, Inc. v. City of San Diego* (Super. Ct. San Diego County, No. 730011) pending entry of judgment in *Border v. San Diego*, the trial court ruled that both *National Enterprises* and this case involve "the same parties, the same subject matter and the same Development Agreement" as *Border v. San Diego*. That order was filed on June 15, 2001.[17] Because it was on notice of that ruling, which it has not challenged on appeal, plaintiff must reasonably have expected to be bound by the final result in *Border v. San Diego*, given the court's ruling in connection with the stay order. Consequently, the requirements of due process and of privity have been met (*Citizens for Open Access*, *supra*, 60 Cal.App.4th at p. 1070), and the inverse condemnation cause of action is barred by res judicata.

Bernhard v. Bank of America (1942) 19 Cal.2d 807, on which plaintiff relies, does not compel a different result. Plaintiff asserts that in *Bernhard*, the California Supreme Court stated that a successor in interest in real property is a privy of his or her predecessor only if he or she acquires an interest in the property after rendition of a

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[17] We have taken judicial notice that the order was filed on June 15, 2001. (See fn. 8, *ante*.)

judgment affecting the property. We do not agree that this was actually the holding of *Bernhard*, in that the timing of the acquisition of the interest in the property is not the issue the court addressed. (See *id.* at pp. 810-814.) In any event, the court later held in *Clemmer v. Hartford Insurance Co.*, *supra*, 22 Cal.3d 865, that the concept of privity had been expanded since *Bernhard* was decided, to refer to "a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights [citations] and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is 'sufficiently close' so as to justify application of the doctrine of [res judicata]. [Citations.]" (*Clemmer v. Hartford Insurance Co.*, *supra*, at p. 875.)

Nor has plaintiff shown, as it asserts, that the fact that Otay Acquisitions LLC purchased the properties in foreclosure means that Otay Acquisitions LLC and its successor are not subject to "Border's liabilities," i.e., the adverse decision in *Border v. San Diego*. Plaintiff has not provided any authority which holds that if the requirements for privity are otherwise met, a successor in interest to property is insulated from any preclusive effect of a prior judgment affecting the property merely because he or she acquired the property through foreclosure; *Hohn v. Riverside County Flood Control & Water Conservation Dist.* (1964) 228 Cal.App.2d 605 (Fourth Dist., Div. Two), on which it relies, does not involve res judicata or collateral estoppel, nor does it discuss whether a purchaser of property through foreclosure is in privity with the predecessor in interest.

PARTIES' REQUESTS FOR JUDICIAL NOTICE

Except as otherwise noted herein, the parties' requests for judicial notice are denied.

DISPOSITION

The judgment is reversed as to the cause of action for breach of contract. On remand, the trial court is directed to allow plaintiff 30 days to file an amended complaint for breach of contract as stated herein. The judgment awarding attorney fees to the City is also reversed. The judgment is otherwise affirmed.

Plaintiff is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ King
J.